Date: 20080613

Docket: T-1117-06

Citation: 2008 FC 733

Ottawa, Ontario, June 13, 2008

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

NATIONAL CAPITAL COMMISSION

Applicant

and

BOB BROWN and the CANADIAN HUMAN RIGHTS COMMISSION, and the ATTORNEY GENERAL OF CANADA (Representing the DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA)

Respondents

and

THE COUNCIL OF CANADIANS WITH DISABILITIES

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

I Introduction

[1] This is an application for judicial review of the decision of the Canadian Human Rights Tribunal (the Tribunal), dated June 6, 2006, which decided that the National Capital Commission (the applicant or the "NCC"), and Public Works and Government Services Canada ("Public Works") discriminated against Mr. Bob Brown, (the respondent or Mr. Brown) in the provision of

services, on the ground of disability, contrary to sections 5 and 15 of the *Canadian Human Rights Act* (the "*Act*"), R.S.C. 1985, c. H-6; in that the NCC failed to provide universal access at the York Street Steps (the "Steps"), between Sussex Drive and Mackenzie Avenue, in Ottawa and instead installed an elevator at the Daly Building site, located some 130 meters away from the Steps.

[2] Upon the direction of the Tribunal, Public Works was added as a third party respondent on December 9, 2003. As agent of the Crown and owner of the Connaught Building, which is located immediately to the South, between the Steps and the Daly Building elevator, the Tribunal held that there is sufficient nexus between these two Crown entities to impose on Public Works, a duty to facilitate the accommodation of Mr. Brown at or adjacent to the Steps.

[3] This finding against Public Works is the subject of a separate application for judicial review in *Attorney General of Canada (representing Public Works and Government Services Canada) v. Bob Brown, the Canadian Human Rights Commission and the National Capital Commission and Council of Canadians with Disabilities*, T-1132-06. Both matters were heard together over a period of three days in Ottawa. The reasons that follow pertain only to the present file. Reasons for judgment in the companion file, T-1132-06, above, are released concurrently.

[4] For ease of reference, the following table of contents sets out the topics that will be discussed:

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A. The Addition of an intervener

[5] By Order of this Court, rendered on January 17, 2007, the Council of Canadians with Disabilities (CCD) was granted intervener status with full rights of participation, in both files T-1117-06 and T-1132-06.

II Factual context

A. The General Area and the York Street Steps

[6] The NCC is a federal Crown Corporation, mandated by the *National Capital Act*, R.S.C. 1985, c. N-4 (the "*NCA*"). Its objects, purposes and powers are set out in section 10, which provides as follows at paragraph 10(1)(a):

Objects and purposes of Commission	**Mission de la Commission**
10. (1) The objects and purposes of the Commission are to	10. (1) La Commission a pour mission :
(a) prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance; and	a) d'établir des plans d'aménagement, de conservation et d'embellissement de la région de la capitale nationale et de concourir à la réalisation de ces trois buts, afin de doter le siège du gouvernement du Canada d'un cachet et d'un caractère dignes de son importance nationale;
[. . .]	[. . .]

[7] Under this mandate, the NCC began in the early 1990s to redevelop the general area bordered by Murray Street to the North, Wellington and Rideau Streets to the South and Mackenzie Avenue and Sussex Drive to the West and East respectively. The purpose of this long-term urban planning redevelopment was to revitalize this derelict area of the Nation's capital and increase accessibility between upper town -leading to and from the Chateau Laurier, Parliament Hill and Major's Hill Park- and lower town, -into the Byward Market. The Map in Appendix "1" provides an overview of the general area and highlights the four points of access between upper and lower town.

[8] As part of this global plan, going from South to North of this general area, in early 2000, the NCC leased on a long term basis, the Daly Building site at the corner of Wellington and Rideau Streets, Mackenzie Avenue and Sussex Drive, to a private developer, the Claridge Building Corporation. The Connaught Building, the adjacent property, located north of the Daly Building site is owned and operated by Public Works. The NCC has no power and control over the Connaught Building.

[9] The lands between York Street and Murray Street are owned by the U. S. A. government on which the new U.S.A. Embassy (U.S. Embassy) now stands. The land between the Connaught Building and the U.S. Embassy, located at the intersection of York Street and Sussex Drive however, is owned and operated by the NCC. It was used for the construction of the York Street Steps, to create an additional point of access between upper and lower town.

[10] Designed in 1994 by the same architects of the U.S. Embassy, the Steps were constructed between September 1998 and June 1999. They consist of 45 steps that follow the steep embankment, spanning a seven meter rise over 34 meters, between Sussex Drive and Mackenzie Avenue. They begin with 3 steps at the base on Sussex Drive, followed by a 3 to 5 feet landing, then six sets of a flight of seven stairs, each separated by 8 to 10 feet landings.

[11] Built as a complement to the new U.S. Embassy, the Steps have become a thoroughfare, particularly during the festival season of the spring and summer months; serving as a passageway, among others between the two streets in the nation’s Capital.

B. NCC's pre-construction plans to make the Steps Accessible

[12] From the earliest design stages in 1994-1995, the NCC's in-house and external architects considered ways to make the York Street Steps universally accessible, in keeping with the Treasury Board policy to make federal property assets accessible by 1995. In addition to the principles that would be set out in the NCC's Universal Access Policy, September 20, 1996 version, the NCC prepared a working document in 1995, entitled *Barrier Free Site Design Manual*, outlining design guidelines for outdoor sites. These efforts were based on the accepted seven principles of Universal Design, a copy of which is found in Appendix "2" of these reasons.

[13] However, the site's unique topographical features would defeat the plans of the NCC to provide universal access right at the Steps. To illustrate, on November 22, 1994, the NCC met with representatives from the Federal Interdepartmental Technical Committee on Accessibility (FITCA), created to oversee the implementation of Treasury Board policy on accessibility to federal real property. FITCA is made up of architects from Public Works and NCC among others. The participants at this meeting included three representatives of FITCA: Claude Charbonneau, Public Works; John Verity, Public Works and Eric Hébert, FITCA/NCC and four representatives from the NCC: John Abel; Richard Fujarczuk; Alex Kilgour and Daniel Miron.

[14] This meeting of November 22, 1994 canvassed several matters pertaining to universal access to the York Street Steps, including the planning context, the physical context of the site and the program for the Steps at the design stage. Among the methods considered for achieving universal access to the Steps, there was a ramp at 8%, a mechanical lift (funicular type) or an elevator.

[15] The ramp was ruled out since ramps cannot be higher than 5% and there was no opportunity given the physical constraints of the site -the width and slope of the land- to lessen the 8% slope of the ramp. The mechanical options including a funicular and an elevator were also subject of discussion at the meeting. NCC staff indicated that based on previous assessments these mechanical options had been ruled out due to higher initial construction costs and the expense of ongoing maintenance and operation, as well as the financial implications of renovation and maintenance in the long term.

[16] Participants at this meeting then explored several possible alternatives to the ramp and mechanical options. The first alternative to universal access was to collaborate with the U.S. Embassy to provide improved barrier-free access through or around their site by improving the sidewalks along Sussex Drive and Mackenzie Avenue adjacent to the U.S. Embassy, the Connaught Building and the Daly Site. Second, the NCC staff agreed to insist that barrier-free access be incorporated in the Daly site redevelopment, linking Sussex Drive to Mackenzie Avenue at George Street. Finally, the participants at the meeting were unanimous in the need for NCC to consult with advocacy groups for the disabled community to get their input on the best possible option to provide universal access in the area.

[17] That is why the NCC sought opinion from the local group, Disabled Persons' Community Resources, and the Canadian Paraplegic Association (CPA National), in order to give the NCC a sense of the way the York Steps with or without a ramp would be received when constructed.

> [. . .]
> It was suggested that these advocacy groups will be able to understand and accept the fact that the construction of an elevator in this location is not feasible operationally or economically for the

> NCC. Indeed, the amount of traffic through this location may not warrant an elevator.
> [. . .]

[18] On December 13, 1994, the NCC held a meeting with three representatives of the Disabled Persons' Community Resources group, including, J. Black, R. Hubley and Judy Lux, Co-ordinator Barrier-Free Environment Program, Disabled Persons' community Resources. Participants representing the NCC were as follows: J. Abel; A. Kilgour; D. Miron and E. Hébert also representing FITCA.

[19] The Minutes of this meeting reveal, among other things that the input of the disabled groups was key to the future development of the area. The meeting arrived at the following conclusion:

> 3. Conclusions:
> The group concluded that the ramp should be eliminated from the design of the York Steps in lieu of improved alternative routes along Confederation Boulevard, including wider sidewalks, improved lighting, rest stops and drinking fountains. The collaboration of the U.S. Embassy should be sought to seek whatever improvements are possible at the Sussex-Mackenzie-Murray intersection to facilitate universal accessibility around the north end of their property. In future plans for the re-development of the Daly Site, barrier-free access should be incorporated at the north end of the site to facilitate access to and from George Street.

[20] In light of the suggestion of the disabled groups, in a letter dated December 20, 1994, Mr. John Abel, Director, Design and Land Use Division, NCC wrote to Mr. Ned Arcement, Minister – Counselor for Administrative Affairs, U.S. Embassy, in which he presented matters relating to the York Street Steps and building codes. The letter conveyed the conclusions reached at both meetings with FITCA and the disability groups. It also announced NCC's decision to proceed with the design without the ramp or an elevator. It gave the go ahead for the construction of the Steps by the same architect who built the U.S. Embassy.

[21] In addition, to the consultation meetings and the above-noted correspondence between the NCC's architect and the U.S. Embassy, Mr. Éric Hébert, an NCC –FITCA representative who participated in both the November 22 and December 13th 1994 consultation meetings, wrote to Mr. Alex Kilgour, NCC Architect of the project. In his letter in French, dated January 9, 1995, Mr. Hébert acknowledged that it would be difficult to incorporate measures at the site to make the Steps accessible. As a result, the NCC should consider alternative accommodation to the Steps in the general area, including widened sidewalks, and universal access at the anticipated Daly site. These alternative routes would enable all participants to take part in events held at the popular Major's Hill Park.

[22] Based on the conclusions of the two sets of consultations, first with FITCA, then with representatives of the disabled community, and keeping in mind the concerns of Mr. Hébert, and the considerations of the U.S. Embassy and exploration of common access with the Connaught Building, the NCC proceeded with construction of the Steps without a ramp or an adjacent elevator, with the undertaking that it would implement all the recommended improvements, including proper signage, widened sidewalks, and benches for repose, as well as an elevator at the Daly site.

C. Alternative accommodation: The Daly site Elevator

[23] The NCC undertook and included in the final development agreement with the Claridge Building Corporation, the private developer of the Daly Building site, the provision for a stand alone universally accessible elevator, which would be available to the general public 24 hours a day. Article 3 of the Development Agreement – Sussex/Mackenzie dated April 2002 provides as follows:

> 3.1 Final Plans
> 5. Without limiting the generality of the foregoing, the Developer covenants and agrees that the Final Plans shall include:
> (a) an elevator at the north-east corner of the site to be constructed in conjunction with the George Street stairs for the purpose of

> providing barrier-free access from Sussex Drive to Mackenzie Avenue at the north end of the Lands; [. . .].

[24] In a letter dated May 16, 2003 to Mr. Bill Malhotra, P. Eng, President of Claridge Homes Corporation, Mr. John Abel, of the NCC, wrote to object to the proposed "LULA", limited use/limited application type elevator for the Daly site. The LULA elevator did not meet the minimum industry standards to install an elevator with sufficient internal area and easy-to-use controls to meet the needs of physically disabled individuals. In strong language, Mr. Abel wrote:

> On this basis, the proposed device is not acceptable to the NCC. An elevator is required that meets both the full dimensional and barrier free standards provided to your consultants, and it must be sufficiently robust to meet the demands of the outdoor location and the intensity of use likely during Canada Day or the many other national events in the Capital.

[25] Also, on June 9, 2003, Mr. Abel wrote to Mr. Thomas Schweitzer as a follow-up to the joint meeting of April 29, 2003 concerning the detailed plans for the Sussex/Mackenzie South development. Mr. Abel raises the concerns with respect to the LULA elevator, and states:

> We have recently received confirmation from Claridge that this is being resolved in favour of an elevator that meets the minimum area of 1725 x 1370 mm. previously defined by the NCC, rather than a LULA type device.

[26] This ongoing correspondence between Mr. Abel and Mr. Schweitzer included a set of the Developed Design drawing, dated August 1, 2003 to which Mr. Abel responded with further concerns in a letter dated September 30, 2003. In particular, Mr. Abel raised the issue that clear and direct views of the elevator at the Sussex Drive level were partially obstructed from the proposed concierge desk and consequently withheld final approval of the design until that aspect was corrected.

[27] In light of the above correspondence, the defects were rectified and a secure barrier-free Daly site elevator was installed during the construction of the Daly Building and became fully operational in the Summer of 2005. However, this would be six years after the construction of the Steps and the filing of a human rights complaint by Mr. Bob Brown.

D. Bob Brown lodges Human Rights Complaint

[28] Mr. Brown is a quadriplegic since 1972 and uses a wheelchair. He is an active longtime resident of the Byward Market. Mr. Brown was the Chairperson of the City of Ottawa Disability Issues Advisory Committee (the "Committee"), in 1998 when the Steps were being built.

[29] This Committee discussed the plans for the Steps and felt that there were reasons for concern because the Steps were not accessible to people with physical limitations. Before long, a public controversy ensued with a letter from Mr. Brown to the Editor of the *Ottawa Citizen*, following communications between Mr. Jim Watson, at the time, Mayor of the City of Ottawa, and Mr. Marcel Beaudry, the then Chairperson of the NCC.

[30] The NCC took immediate action to respond to the controversy both in the media and with the disabled community. On March 17, 1999, the NCC held a meeting with the Access Committee of the Disabled Persons Community Resources Group (DPCR), a non-profit organization that carries out assessments of buildings in Ottawa-Carleton to improve accessibility to peoples with disabilities.

[31] After an overview of its initial designs to include a ramp or an elevating device at the Steps, and the consultation it had conducted with both in-house and external architects, as well as the disability groups, the NCC explained that the Steps were being constructed without universal access because the topographical features precluded safe and secure universal access measures at the Steps.

[32] In addition, the NCC presented its plans to provide alternate reasonable accommodation by widening the sidewalks and installing visible and improved signage. But more importantly, the NCC provided evidence of its explicit undertaking that the Daly site, which was part of the long term redevelopment of the general area, would have a stand alone universally accessible elevator.

[33] To Mr. Brown, this was simply not good enough as it did not address his concerns right at the Steps. Moreover, the Daly site elevator would not be adjacent to the Steps but some 130 meters away; thereby creating a distinction and difficulty for persons with disabilities in violation of the principles of Universal Design, including principles 1 and 6:

> PRINCIPLE ONE: Equitable Use: The design is useful and marketable to people with diverse abilities.
> [. . .]
> PRINCIPLE SIX: Low Physical Effort: The design can be used efficiently and comfortably and with a minimum of fatigue.
> [See Appendix “2” of these reasons.]

[34] As a result, on August 31, 1999, Mr. Brown filed a human rights complaint with the Canadian Human Rights Commission alleging that the NCC is discriminating against him on the ground of disability by denying him access to services and facilities right at the Steps that are customarily available to the general public. Mr. Brown’s complaint stated in part as follows:

> I use a wheelchair.
>
> The area of Sussex Drive and Mackenzie Avenue is not accessible to wheelchair users.
> […]
> The specific area that I am concerned with is the York Street Steps.
> [. . .]
> I have been advised that the Daly site development includes an elevator which is located on the north side of the property. This proposed remedy is not suitable. The accessibility would not be equal to that of able-bodied individuals. The hours of access would be limited and the distance to travel to gain access to this area is substantially farther than that of able-bodied persons.

Thus, Mr. Brown's human rights complaint refers to the general area and then the York Street Steps.

E. Proceedings before the Canadian Human Rights Commission (the "Commission")

i) Investigation Report

[35] The Commission investigated Mr. Brown's human rights complaint of August 31, 1999. By letter of Defence, dated November 10, 1999, to the Commission, the Chairman of the NCC outlined the efforts undertaken to provide universal access at this topographically challenging site. Mr. Beaudry wrote that preliminary sketches were prepared for the integration of a ramp within the stairs based on established guidelines and standards. Unfortunately, following consultations with various disability groups, including FITCA and the Disabled Persons' Community Resources Group, in 1994, the incorporation of a ramp was not feasible.

[36] Moreover, Mr. Beaudry indicated that the option of installing an elevator was reviewed and rejected when it was determined the only location to install one would force the users to come out directly onto the vehicular service ramp for the Connaught building. This option was seen as creating a dangerous conflict with wheelchairs and vehicles, especially delivery trucks. As a result,

the NCC would incorporate barrier-free access within the development of the Daly Site. “Two access points –an external elevator located at the north end of the Daly site and another inside the building will ensure easy access between Mackenzie Avenue and Sussex Drive, approximately 130 meters south of the York Steps.”

[37] The investigator made several findings on the accessibility of the York Street Steps as set out in the following paragraphs of the Investigation Report:

> 13. [Gerald] Lajeunesse, [NCC, Chief Landscape Architect], commented that installing an elevator was not feasible as the only location to install one would force the users to come out directly onto the vehicular service ramp for the Connaught Building.
> [. . .]
> 14. The complainant says that a ramp may not be the best access for wheelchair users, however believes that an elevator located directly at this site is more appropriate. He suggests that the proposed accessibility options at the Daly site, which he indicates is 130 meters south of the Steps, do not afford equal access. The complainant does not feel that the two organizations consulted by the respondent are authorized to represent the interests of disabled individuals such as himself.

[38] The investigator also observed that the general area can be accessed by wheelchair users via an unencumbered sidewalk and the complainant agreed that a ramp was not feasible. In addition, the implementation of the Steps was not a necessity but an enhancement to the downtown core area. Finally, other practical alternatives are being considered as the site develops.

[39] In light of these findings, the investigator recommended in a report dated June 13, 2000 that “the Commission dismiss the complaint because, on the evidence, the allegation of discrimination is unfounded.” The evidence showed that the Steps are not essential and the area is accessible through alternative routes. Moreover, the NCC did consider accessibility options through its consultation process and the parties agreed that access directly at this particular location was not recommended.

Finally, the evidence showed that the site was then under development and the NCC was committed to improving accessibility in this area.

[40] By letter dated June 25, 2000, Mr. Brown wrote to the Commission requesting that it reconsider the conclusions of the investigation report. The Commission returned the matter for further investigation, with the following direction:

> i. obtain an expert opinion on how the location could be made accessible to wheelchair users; and
>
> ii. obtain sufficient information from the expert and the respondent to enable the Commission to determine whether the respondent has met its legal responsibility to accommodate wheelchair users up to the point of undue hardship.

ii) Further investigation: The First Rapson Report June 14, 2001

[41] The Commission sought expert opinion from the Progressive Accessibility Re-Form Associates (PARA) represented by Mr. David Rapson, a Project Manager at the Universal Design Institute, which is a semi-independent non-profit organization affiliated with the Faculty of Architecture, University of Manitoba. Mr. Rapson provided two reports, the second of which will be dealt with further in these reasons.

[42] The first Rapson report, dated June 14, 2001 was limited in that Mr. Rapson did not make a personal visit to the site because such a trip was not funded by the Commission. This report was based on photographs, and a detailed analysis of the plans of the general area and of the Connaught Building. Mr. Rapson also relied on second hand reports from site visits made by third parties, including an Ottawa Designer and contact person, as well as two members of Mr. Rapson's review team.

[43] Based on these sources and documentation, Mr. Rapson made several findings, entitled Problem Summary. First, he acknowledged that a proper ramp at the stairs would be impossible because of the width and slope of the site. Second, an exterior elevating system would also not be appropriate because of pedestrian flow, weather conditions, as well as maintenance and other associated costs. Third, the alternative accessible routes around the site on the sidewalks along Sussex Drive, Wellington Street, Mackenzie Avenue, and Murray Street seemed to be excessively long for someone in a wheelchair and the potential elevator down the street was not "conveniently adjacent" to the site in order to serve persons with disabilities equitable.

[44] Fourth, the NCC did have a consultation process to consider accessibility options. However, Mr. Brown did not feel that the two organizations consulted by the NCC were authorized to represent the interests of disabled individuals such as himself. Mr. Rapson concluded that if that were the case, then it was incumbent on the NCC to expand the consultation process to encompass a wider representation of persons and organizations in order to solicit opinions and comments on the problem site. This, Mr. Rapson felt was a problem not fully addressed in the NCC's consultation process.

[45] Fifth, Mr. Rapson concluded that NCC did not follow three of the applicable principles of universal design, including Principles One –Equitable Use; Two –Flexibility in Use and Six –Low Physical Effort. As a result of these findings, Mr. Rapson responded to the Commission's two questions in the following manner:

> [. . .] the first question asked, seems to have an obvious answer. Consult/negotiate with the owner/manager of the Connaught building to upgrade the existing entrances/exits and interior elevator (to current accessibility standards). [. . .]

> It seems that the respondent, in its attempts to follow the concepts of universal design, was not clear on what universal design encompasses. Base [*sic*] upon the information received we feel that the respondent did not meet its legal responsibility to accommodate wheelchair users up to the point of undue hardship.

[46] The investigator also sought additional information from the NCC, and together with Mr. Rapson's findings in his first report, the Investigator prepared a supplementary report dated June 29, 2001.

iii) Investigator's Report - Supplementary

[47] The conclusions of the supplementary investigation report are based on the findings in the first Rapson report as summarized above. As a result of these findings the investigator's supplementary report made the following recommendations:

> 11. Pertaining to the first question asked by the Commission, PARA [Progressive Accessibility Re-Form Associates] states that the respondent should consult and negotiate with the appropriate persons of the Connaught building to upgrade the existing entrances/exits and interior elevator.
>
> 12. Pertaining to the second question, it is the opinion of PARA that the respondent did not meet its legal responsibility to accommodate wheelchair users up to the point of undue hardship.

The complaint was subsequently referred to the Tribunal.

F. NCC efforts following filing of Human Rights Complaint

[48] After Mr. Brown's human rights complaint in August 1999, the NCC undertook a complete review of the location and all possible options to make the Steps accessible right on site. To that end, on April 23, 2002, the NCC hired the Firm of Robertson Architects and Associates (the "Consultant") to provide a fresh look at the site and to make proposals on how to best make the Steps accessible.

[49] On June 17, 2002, Ms. Danica Robertson, Robertson Architects and Associates sent an e-mail message to Ms. Sherry Berg, the NCC, along with a copy of a five-page Project Summary prepared for the NCC entitled "York Steps Universal Accessibility Assessment Study," dated June 16, 2002. Her colleague Robert Martin sent an identical e-mail that same day to Mr. Ray Charette, Public Works. Both messages solicited feedback on the proposal in the Project Summary described as follows:

> The best option to provide universal accessibility for the site would be an elevating device accessed from the delivery entrance beside the Connaught building. It could be entered and exited through, or near, existing doors at the southwest edge of the property. This elevator would connect the Sussex Street level to the stairs at the landing that is already accessible by ramp.

[50] In reply to Ms. Robertson that same day, Ms. Berg stated as follows:

> Danica:
> [. . .]
> I think what you are proposing is a valid option worth pursuing (especially if there are no site constraints as to why we cannot install it) and we need to vet it out with them. The Daly site option should be one that can be reviewed further.

[51] By e-mail dated June 27, 2002, Mr. Charette responded as follows to Mr. Martin's proposal to install an elevator at the southwest wall of the Steps, near the Connaught Building Ramp:

> Mr. Martin,
> I have met on site with representatives of the occupant facilities group, as well as the building security representative to assess this option and a number of concerns were raised.
> - Increased security risks to the Connaught building due to potential unauthorized access through the garage and tunnel exits.
> - The turning radius of delivery vehicles exiting the tunnel comes within 3 feet of the Southwest wall (York Stairs).
> - Larger vehicles needing access to the Tunnel loading dock cannot access from the south lane way and therefore backup in the north lane way.

> These large tractor-trailers would put the public at risk.
> - There is a high volume of traffic from the tunnel exit that would create a substantial risk to the public.
> - The slope of the ground (exit roadway) towards Sussex may not meet accessibility standards.
>
> In short, this option would put the public at a substantially high safety risk and could potentially compromise the building security. Unfortunately, installing an elevating device at this location does not seem to be an acceptable option.

[52] As a result of this feedback to the Project Summary, the Consultants narrowed the options and released a Draft Report entitled Universal Accessibility Assessment Study York Street Steps Draft Report, dated July 19, 2002. This Draft Report was sent to the NCC and representatives of key stakeholder groups by letter dated July 18, 2002. The recipients were invited to a meeting on July 23, 2002 to discuss the contents of the report, including the following five options:

1) The continuing use of the existing alternate routes at the north end or south end of the block;

2) Building a stair platform lift at the Steps;

3) Building an elevating device accessed from the Connaught Building vehicular ramp;

3)a Relocating the south wall of the Steps and building an elevating device directly adjacent to the Steps; and

4) Building an elevating device at the Daly building.

[53] The Consultant expressed a preference for option 3)a and provided a detailed budget outlining a preliminary estimate of $425,616.00, to remove the south wall of the Steps and install an elevator.

[54] Acting upon the advice of one of the Commission's Conciliators, the NCC did not invite Mr. Brown to attend this meeting on July 23, 2002. However, members of disability organizations were present, including: Mr. Brown's colleague, Mr. Giles Warren (GW), City of Ottawa Accessibility Advisory Committee; Ms. Elizabeth Norris (EN), Canadian Paraplegic Association (CPA) National; Ms. Danielle Vincent (DV), Disabled Persons Community Resources and Ms. Katie Paialunga (KP), Independent Living Centre. Other participants at this meeting included: Steve Fulcher (SF), U.S. Embassy; Robert Martin (RM), and Robertson Architects and Associates; and Danica Robertson (DR), Robertson Architects and Associates. Finally, there were five representatives of the NCC at the meeting:

- Gerry Lajeunesse (GL);
- Eric Hebert (EH);
- John Abel (JA);
- Richard Furarczuk (RF) and
- Shauna Trudeau (ST).

[55] The Minutes of the meeting reveal that the participants were unanimous in their vote in favour of option 4, the Daly Building elevator, which was considered to be a safer location than if the elevator was installed at the Steps.

[56] Several participants provided feedback to the Consultants on the Minutes of the meeting held on July 23, 2002. These comments became part of the Consultants' Final Report to the NCC entitled "Universal Accessibility Assessment Study York Street Steps." Excerpts of some of these comments on the Minutes of the meeting are reproduced below:

a. Alf Gunter, M.S. Society who was invited but was unable to attend the meeting wrote as follows by e-mail dated July 25, 2002:
[. . .]

As a general comment I would like to congratulate the NCC for taking the requirements of the Human Rights Commission so seriously. If all levels of the public and private sectors would follow suit, Canada would be a mecca for persons with disabilities, rather than lagging behind most developed nations, including the USA, where the Americans With Disabilities Act has mandated national standards for more than a decade.
[. . .]

b. Stephen Fulcher, U.S. Embassy, by e-mail dated July 23, 2002, wrote as follows:
Robert and Danica: Thank you for pulling together a diverse team. As a representative of the U.S. Embassy and neighbor of the York Street Steps, I concur with the findings of the report and meeting identifying the Daly site as the best option for universal accessibility. Please keep me informed of any changes.

c. Ray Charette, Public Works, by e-mail dated July 24, 2002, wrote as follows:
Thank you for keeping me informed. Let me know if you require assistance for any future matter.

d. Elizabeth Norris, Regional Services Coordinator, CPA Ontario-Eastern Region, wrote a two-page letter dated, July 26, 2002, pertinent passages of which are as follows:

Dear Ms. Robertson and Mr. Martin:
Thank you for the opportunity to participate in the York Street Steps Accessibility Study.
[. . .]
Both the content of this study and the process by which it was communicated to CPA Ontario were indicative of a thorough analysis of the barriers in question. The inclusion of relevant background information such as the Seven Principles of Universal Design and correspondence attesting to security risks inherent in particular options laid the groundwork for a constructive and profitable exchange on July 23rd among organizations representing peoples with disabilities, the NCC and its consultants.

Clearly, there are a number of factors, some of which are unique to Ottawa, which have affected the viability of the options under consideration i.e. vertical lift platform is impracticable in this inhospitable climate. And, the intensification of security concerns within the last year have eliminated any possibility of improving access by redirecting people with mobility impairments through adjacent buildings such as the U.S. Embassy or Connaught Building.

> Based upon the report and expertise of the various stakeholders present on July 23rd, the decision to install a multi-purpose stand alone elevating device serving the market-area appears to be a reasonable and equitable response to the barrier posed by the York Street Steps. In keeping with the first Principle of Universal Access Design, it appears to "avoid segregating or stigmatizing users" –the elevator is to be located in an upscale condominium unit/shopping complex whereas using the existing Connaught Building service ramp would not only place users at some physical risk but would likely be perceived as degrading by passers-by than the on-site option and therefore appears to pose fewer safety risks to persons with disabilities operating the elevator.
> [. . .]

[57] The NCC recognized that access to the Steps remains barred to people like Mr. Brown who are confined to wheelchairs. Notwithstanding, it maintains that while it recognized that the Daly building was an imperfect solution, it was the agreed to best option within its power and control to provide universal access between Sussex Drive and Mackenzie Avenue, its ultimate goal.

G. The Second Rapson Report –May 15, 2003

[58] At the request of the Commission, Mr. Rapson's second report, dated May 15, 2003 provides a response to the Robertson Architects and Associates Final Report on the York Street Steps of July 2002. In addition to considering the five options proposed in the Robertson Final Report, Mr. Rapson added the Connaught Building as an option; a position acknowledged and adopted by the Tribunal at paragraphs 49-57 of its decision.

[59] On the basis of Mr. Rapson's testimony before the Tribunal on his findings in both reports, including his suggestion that the Connaught Building is the best possible option to provide universal access near the Steps, the Tribunal interrupted the proceedings, ordered the Commission to add Public Works as a respondent in December 2003, before rendering its decision on June 6, 2006. It is this decision that forms the object of the two applications for judicial review.

III. The Impugned Decision

[60] The Tribunal found that the NCC and Public Works had discriminated against the Respondent Bob Brown by failing to provide access to persons with disabilities at the Steps. For the purposes of the present application for judicial review, the Tribunal concluded as follows:

1) The NCC is providing a service within the definition of the *Act* by both designing and maintaining the York Street Steps.

2) The establishment of a prima facie case of discrimination does not shift the onus to the respondent to establish a defence. It concluded as follows:

> 182 The conventional analysis in the law of human rights holds that the Complainant must establish a prima facie case of discrimination. There must be some evidence that the Complainant requires accommodation. Once this is established, the burden of proof in the case shifts to the Respondent, who is required to establish that this would impose an undue hardship under subsection 15(2).
>
> 183 [. . .] In my view, the fundamental burden of proof--sometimes called the "legal" or the "persuasive" burden--in a case of discrimination remains on the person alleging the discrimination throughout the course of the hearing. The prosecuting party must prove its case. The legal burden does not shift.

3) The Steps are not accessible to people with disabilities. The accommodation should be done at the Steps.

4) The Daly site elevator is not reasonable accommodation, as the 130 meters do not require low physical effort and prove to be inequitable by having to separate disabled people from their able-bodied counterparts; thereby violating two of the seven Principles of Universal Design. It stated:

> 33 Mr. Rapson is of the view that the York Street Steps do not meet the principles of universal design. They are not, in his view, accessible. The elevator at the Daly site does not rectify the situation. I have generally accepted Mr. Rapson's opinion on these issues. I found his evidence thoughtful and measured. He understood the need to make reasonable compromises.

5) The construction of the elevator at the Daly site does not satisfy the Crown's obligation to accommodate Mr. Brown and other persons who cannot climb the stairs.

6) The duty to accommodate includes a duty to consult. The Tribunal stated:

> 212 The duty to accommodate includes a duty to consult. The CHRC has submitted that the NCC "must demonstrate that it followed proper process." This is probably the major issue in the case.
>
> 220 I take it from *Grismer* that the first obligation to accommodate is obligation to enter into a proper process of consultation. The Respondent must inquire into the matter and obtain the views of the persons who require accommodation. I would go further and say that there is an element of natural justice in this process. There must be an open exchange of views and the persons who require accommodation should be given an opportunity to reply to any concerns that might prevent the Respondent from providing the accommodation that they are seeking.

7) The NCC consultation processes in 1994 and 1999 were selective and insufficient as a result of which they did not meet the requirements of the duty to accommodate. It said:

> 218 The situation before me in the present case concerns the public at large rather than an individual. There are nevertheless parallels with Grismer. Mr. Brown and the CHRC say that there was no real investigation of the situation. I do not accept this. I nevertheless agree that the NCC did not enter into a proper round of consultations. There was no real airing of the views of the people who needed the accommodation.

8) The present inaccessibility of the Steps stems from the initial decision by the NCC to design the Steps without proper accommodation.

[61] With respect to liability, the Tribunal stated as follows at paragraph 9 of its decision:

> 9 The following decision essentially deals with liability. I agreed that I would only deal with the different proposals to provide accommodation at the York Street Steps, if that became necessary.

[62] In spite of this agreement to bifurcate the decision, the Tribunal did deal with the issue of remedy. However, the Tribunal recognized that it would be premature to comment on the kind of accommodation that would be appropriate and was mindful to advise that the respondents are limited to the provision of reasonable accommodation. The Tribunal thus directed the parties to return to their negotiations and provide a schedule for consultations. Once these negotiations are completed, the NCC is to deliver a formal letter to the Tribunal setting out its plans to rectify the situation. The other parties were accorded a period of 30 days to return to the Tribunal if this remedy proved to be untenable.

[63] By Order of this Court, dated November 7, 2006, Mr. Justice Pierre Blais (as he then was) stayed the Tribunal's decision; pending the outcome of the two applications for judicial review.

IV Issues

[64] This application for judicial review seeks to determine whether the Daly site elevator provides reasonable accommodation for the lack of accessibility at the York Street Steps. In so doing, the applicant NCC challenges several of the Tribunal's findings of fact and law, which the Court summarizes as follows:

a. Did the Tribunal err in law in determining that the York Street Steps constitute a service or a facility within the meaning of section 5 of the *Act*?

b. Did the Tribunal err in law in concluding that when it is established that there is a *prima facie* case of discrimination, the onus does not shift to the respondent to demonstrate that accommodation was undertaken short of undue hardship?

c. Did the Tribunal err in fact or law in finding that the duty to accommodate involves a duty to consult?

d. Did the Tribunal err in fact or law by limiting its analysis to the bottom of the Steps rather than approaching its analysis globally?

e. Did the Tribunal err in fact or law when it rejected the Daly site elevator without doing the proper balancing?

[65] For the reasons that follow, this application for judicial review shall be allowed in part. While the Court finds that the Tribunal was correct in law in finding that the York Street Steps are a facility that provide a service within the definition of section 5 of the *Act*, the Court is of the view that the Tribunal committed four errors of law warranting the intervention of this Court: first, by not shifting the onus to the respondent (the NCC) to demonstrate that accommodation was undertaken short of undue hardship; second, by finding that the duty to accommodate includes a legal duty to consult; third, by limiting its analysis to the bottom of the Steps instead of adopting a global approach to the general area; and finally, by dismissing the Daly site elevator as a reasonable form of accommodation without conducting the proper balancing of factors.

V Relevant legislation

[66] Section 5 of the *Act* provides as follows:

Denial of good, service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	b) de le défavoriser à l'occasion de leur fourniture.

[67] Paragraph 15(1) (g) sets out the conditions whereby a respondent may put forth a *bona fide* defence to a *prima facie* case of discrimination in the provision of services. This paragraph states as follows:

Exceptions 15. (1) It is not a discriminatory practice if [. . .] (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.	**Exceptions** 15. (1) Ne constituent pas des actes discriminatoires : [. . .] g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

VI. Standard of Review

[68] After written submissions were filed but before the hearing of this case on April 7 to 9, 2008, the Supreme Court of Canada rendered two decisions in *Dunsmuir v. New Brunswick* (*Dunsmuir*), 2008 SCC 9 and in *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (*Via Rail*), 2007 SCC 15. The parties were invited to provide supplementary written submissions addressing the relevance of these decisions to the applications for judicial review before this Court.

A. *Dunsmuir*: General principles

[69] In *Dunsmuir*, above, the Supreme Court of Canada modified the nature of the standards of review applicable to administrative decisions. There are now only two standards of review: reasonableness and correctness. (See *Dunsmuir*, above, at paragraph 45.)

[70] The reasonableness standard is a new construct whereby the Court merged the two previous standards of reasonableness *simpliciter* and patent unreasonableness into one broad standard of reasonableness. The Court provided the following guidance at paragraph 47, to help reviewing courts identify the elements of an unreasonable decision:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[71] This deferential standard of reasonableness implies that the decision was arrived at not only through a justifiable, intelligible and transparent process but it falls within an acceptable range of possible outcomes in light of the facts and the law of each case. As such, the reasonableness standard applies to questions of fact, discretion and policy and to questions of mixed fact and law

where the question is factually intensive or where the legal issues cannot readily be separated from the factual context. See paragraph 51, as well as paragraph 53, which provides as follows:

> 53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; Dr. Q, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[72] With respect to the correctness standard of review, the Court preserved it intact. Questions of jurisdiction, law, constitutional issues and natural justice remain subject to review on the correctness standard. In such instances, the reviewing court must determine, at the outset whether the impugned decision was correct and undertake its own analysis; substituting its own view, the correct answer, in those instances where the decision is incorrect, as it is enunciated at paragraph 50:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. <u>When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.</u> [Emphasis of the Court]

[73] This exacting standard of judicial review is a constitutional duty; indispensable to the respect of the rule of law. Where the standard of correctness is engaged, reviewing courts have a special responsibility to ensure that administrative decision-making bodies do not breach their statutory boundaries:

> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[74] Having established these two standards of review, the Court provided a two-step process for determining the applicable standard of review. First, the reviewing Court will look to the existing jurisprudence to determine whether the question has already been decided in a satisfactory manner. If so, that settled standard of review is to be adopted. Second, where there is no prior case law or where the existing case law has not dealt satisfactorily with the standard of review, the reviewing Court will proceed with an analysis to identify the proper standard of review, as instructed at paragraph 62:

> 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[75] When the reviewing Court proceeds to the analysis in the second step, its analysis should be contextual. Moreover, the new "standard of review analysis" should examine a number of factors not unlike the four factors of the former "pragmatic and functional approach" as outlined in paragraph 64:

> 64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling

> legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[76] Finally, at paragraph 142 in his concurring opinion, in *Dunsmuir*, above, Mr. Justice Binnie reaffirmed the general principle of segmentation, which stands for the proposition that where multiple aspects of a tribunal's decision are under judicial review, the reviewing judge must examine each issue and arrive at the appropriate standard of review for each discrete issue raised in the impugned decision.

B. Application of Dunsmuir to the present file

[77] There is a lack of consensus between the parties on the appropriate standard of review applicable to the issues that animate this case. While they may agree on the applicable standard of review on some of the issues, they do not see eye to eye on others. As such, I shall proceed with a systematic application of the general principles as outlined in *Dunsmuir,* above, to each of the issues, based on the two-step procedure established by the majority and the segmentation principle espoused by Mr. Justice Binnie.

i) Proper standard of review on the statutory interpretation of the York Street Steps as a "service" or "facility"

[78] This Court must first go back to the applicable jurisprudence in order to determine the appropriate standard of review. It should be noted at the outset that the Tribunal's decision does not deal with universal access to a building, such as a retail department store, a movie theatre or an office complex but rather it involves a concrete staircase; providing a passage between two streets.

[79] Finally, the applicant NCC would invite the Court to rely on the Supreme Court's decision in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (*Mossop*) as determinative of the standard of review. At paragraph 26, Chief Justice Anton Lamer, writing for the majority, adopted the concurring reasons of Mr. Justice Gérard LaForest who addressed the question of the standard of review in relation to decisions of human rights tribunals under the *Act*, where he established that Courts maintain their reviewing role in questions of law unless there is express legislative intent to limit judicial review of decisions made pursuant to the *Act.*

[80] Contrary to the position of Counsel for Mr. Brown, the Court concludes that *Mossop,* above, disposes of this first issue and is applicable to the other issues as well. Here, the Tribunal was called upon to interpret section 5 of the *Act* and in particular determine whether the York Street Steps constitute a 'service' or a 'facility.' The nature of the question is one of statutory interpretation. The standard of review is correctness and not reasonableness as Counsel for Mr. Brown and the Commission submit. The Court will intervene and substitute its own position only where it has determined that the Tribunal erred in law in its resolution of this issue.

ii) Proper standard of review on shifting of the onus in the prima facie test

[81] Where addressed, the parties agree that the Tribunal's finding that the onus in the *prima facie* test does not shift to the respondent constitutes an error of law. The Court shares this view and for the reasons identified in *Mossop,* above, the standard of review for general questions of law, such as this, is correctness.

iii) Proper standard of review on the finding that the duty to accommodate involves a duty to consult.

[82] The Applicant, NCC adopts the position that the Tribunal's imposition of a legal duty to consult as a requirement of the duty to accommodate is an error of law; subject to the correctness standard. The respondent, the Attorney General of Canada (AGC), on behalf of Public Works agrees.

[83] For the AGC, the *Act* does not impose a legal duty upon respondents to consult particular persons or investigate particular solutions. In addition, the AGC submits that in arriving at this novel idea, the Tribunal misinterpreted *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 (*Grismer*), the jurisprudence upon which it relied. *Grismer*, above, does not oblige a respondent to 'enter into a proper process of consultation.' (Memorandum of the Attorney General of Canada, paragraph 18.)

[84] The other respondents Brown and the Commission, as well as the intervener, the CCD beg to differ and are consistent in their view. Counsel for the Commission submits that all the main issues of this application for judicial review raise fact-laden questions of mixed fact and law. Consequently, the decision of the Tribunal is to be reviewed on a standard of reasonableness.

[85] Relying on the decision of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General),* [2005] F.C.J. No. 2056, Counsel for the Commission submits that "[w]hile the NCC argues that the findings are "law-intensive," the Tribunal's decision merely applies the recognized human rights principles to the particular set of facts in this matter. The Tribunal's finding of liability flows from the facts before it and is not, as was the case in *Sketchley*, "wholly dependent on

its conclusion concerning a particular and discreet question of law." (See Memorandum of Fact and Law of the Canadian Human Rights Commission, paragraph 67.)

[86] Counsel for the Respondent Brown relies on *Dunsmuir,* above, to establish that the standard of reasonableness applies. The Tribunal's decision raises "questions that are entirely fact-centric and individualized" and where this Court may, in the alternative characterize them as questions of mixed fact and law, deference should be accorded because the legal issues in this case are intimately intertwined with and cannot readily be separated from the factual issues.

[87] Similarly, Counsel for the intervener argues that the reasonableness standard applies to the imposition of a duty to consult. It is further argued that this order to consult is "entitled to considerable deference given that its purpose is to remedy the systemic discrimination which persons with disabilities experience as one of the most disadvantaged groups in the country." Moreover, "[t]he order to consult sought to bridge the chasm between the federal Government's theory and its practice with respect to anti-discriminatory procedures, and it is fully supported by the evidentiary record and factual findings of the Tribunal" (See Supplemental submissions of the Intervener Council of Canadians with Disabilities, paragraph 22).

[88] The Court is not persuaded by the arguments of the respondents that the reasonableness standard applies to this particular issue. In coming to this conclusion, the Court is mindful of the four factors in the "standard of review analysis" as indicated at paragraph 63 in *Dunsmuir,* above. In this regard, the fourth factor, in other words, the nature of the question dominates the analysis. By imposing a legal duty to consult on the respondent, the Tribunal deals with a pure question of law, which has general importance and indeed far reaching consequences for others in the future and this

includes not only service providers, such as the NCC and Public Works (T-1132-06) but also employers who are governed by human rights legislation and must grapple with these serious issues as well. (In addition to *Dunsmuir,* above, see among others, *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226 at paragraph 26 and *Sketchley v. Canada (Attorney General),* [2005] F.C.J. No. 2056 at paragraphs 69, 73, and 78).

[89] The Tribunal of its own volition did not confine itself to the four corners of the *Act* and attributed to the Supreme Court of Canada a new interpretation of its human rights jurisprudence as developed in *Grismer,* above. Creating a legal duty to consult raises general questions of law, having significant consequences for subsequent human rights matters and as such requires the exacting standard of review of correctness.

iv) Proper standard of review of the local versus the global approach

[90] This issue is one of law. The Tribunal was called upon to determine whether the York Street Steps discriminated against Mr. Brown and in so finding whether the initiatives undertaken by the NCC to rectify this lack of accessibility at the steps constituted reasonable accommodation. As such, the Tribunal was required by law to weigh in the balance all the evidence, including its evaluation of the witnesses under cross examination before arriving at its conclusion. The Court concludes therefore that the appropriate standard of review is one of correctness.

[91] In order to succeed, the respondents must satisfy the Court that the Tribunal was correct when it decided not to consider the global picture; encompassing the redevelopment of the general area and instead limited its analysis to Mr. Brown at the bottom of the Steps.

v) Proper standard of review of the rejection of the Daly site elevator without proper balancing

[92] In *Via Rail*, above, the majority of the Supreme Court of Canada dealt with the importance of human rights Tribunals carrying out the proper balancing in order to determine whether the respondent has fulfilled its duty to provide reasonable accommodation short of undue hardship. This balancing act is a contextual exercise based almost exclusively on the facts. However, the initial decision to do or not to do this balancing of factors is a question of law. Consequently, the standard of correctness applies to this question of mixed fact and law.

[93] In summary, all five issues will be reviewed on the standard of correctness. The Court will follow the guidance provided by the Supreme Court of Canada at paragraph 50 in *Dunsmuir,* above. Where the Court finds the Tribunal has erred in law, it will proceed with its own analysis and substitute its views, the correct answer.

VII. Analysis

A. Did the Tribunal err in law in determining that the York Street Steps constitute a service or a facility within the meaning of section 5 of the Act?

[94] The NCC calls into question the Tribunal's decision not to delve into the meaning of the words "service" and "facility," contained in section 5 of the *Act.* Had it done so, it is argued, the Tribunal would have come to the realization that the Steps are not a service, which is the act of doing something, assisting someone, or providing a good or need. The NCC submits that the Steps are an inanimate and intangible installation. Moreover, the Tribunal would have appreciated that the Steps could not be a facility unless they serve a particular function, ease a course of conduct or accomplish a certain end.

[95] This is an untenable argument for two reasons. First, the Tribunal acknowledged that it would be wrong to characterize the physical Steps as a 'service' or a 'facility'. However, section 5 of the *Act* deals with "the provision of goods, services, facilities or accommodation" and as such, the Tribunal held that the Steps fell within the purview of the *Act* because the NCC was providing a service to the general public by virtue of having constructed and maintained the Steps.

[96] Second, the language of the statute is generous enough to encompass the Steps. Indeed, the French version of section 5 uses broad language that incorporates installations such as the Steps. It states:

> Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public
> [Emphasis by the Court]

[97] For these two reasons, the Court finds that the Tribunal did not err in law either in its interpretation of section 5 of the *Act,* or in finding that by virtue of the construction of the Steps; the NCC was subject to the provisions of the *Act.* The Tribunal was correct in its findings on this first issue and that part of its decision remains undisturbed.

B. Did the Tribunal err in law in concluding that when it is established that there is a *prima facie* case of discrimination, the onus does not shift to the respondent to demonstrate that accommodation was undertaken short of undue hardship?

[98] The Tribunal concluded that the prosecuting party must prove its case and "the legal burden does not shift." The parties agree that in so stating, the Tribunal was clearly wrong and committed an error in law. This is not a correct statement of the law nor does it reflect the long line of human rights jurisprudence from the Supreme Court of Canada, which clearly states that once a *prima facie*

case of discrimination is established, the onus shifts to the respondent to establish a defence or provide reasonable explanation.

[99] Madam Justice Beverley McLachlin, as she then was, writing for the Court in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin),* [1999] 3 S.C.R. 3, said at paragraph 70:

> Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR. For the reasons below, I conclude that the Government has failed to discharge this burden and therefore cannot rely on the defence provided by s. 13(4) of the *Code.*
>
> See also *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at paragraph 28;
> *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.) at paragraph 50.
> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paragraphs 20 and 43.

[100] Counsel for Mr. Brown and the Commission submit that this error of law benefits the applicants the NCC and Public Works and as such this Court should not intervene. Furthermore, Counsel for the Commission adds that this error did not adversely affect the Tribunal's ultimate finding of liability and therefore should not serve as a motive to reverse the Tribunal's decision.

[101] The Court cannot follow this line of reasoning for several reasons. First, the Court has a constitutional duty to uphold the rule of law and apply the exacting standard of review where a Tribunal, as in this case has erred in law. *Dunsmuir,* above, instructs us that the reviewing Court must determine at the outset whether the finding of the Tribunal is correct and if not, the Court is to substitute its own view, providing the correct answer.

[102] Second, allowed to stand uncorrected, the Tribunal's finding will impose a double onus on complainants, while leaving scott-free respondents who are in a better position to know what they have or can or ought to have done to rectify situations of *prima facie* discrimination. Clearly, this runs counter to the spirit and the letter of the *Act* and in particular to the exceptions to discrimination provided in section 15.

[103] Third, this error in law would introduce an important revolution in human rights jurisprudence, as well as to the *Act.* Statutory amendments lie within the purview of Parliament and not in the province of the Courts or indeed administrative tribunals, such as the Canadian Human Rights Tribunal. Lastly but as important, by deciding in such a way, the Tribunal was putting itself in the wrong legal frame of thinking and as such led it to approach the other remaining issues wrongly.

[104] For the reasons stated above, the Court quashes the Tribunal's finding that the onus does not shift to the respondent following the determination of a *prima facie* case of discrimination. Consequently, the Court restores the law to its prior state in keeping with the law as settled in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74 and reaffirmed in *Meiorin,* above; *Grismer,* above, and more recently affirmed in *Via Rail,* above. The Tribunal in the present case erred in law.

C. Did the Tribunal err in fact or law in finding that the duty to accommodate involves a duty to consult?

[105] Relying on *Grismer,* above, the Tribunal stated that the duty to accommodate involves a duty to consult. The Tribunal also stated that the main issue before it was whether the process of consultation was legally adequate. It found that it was not. The process adopted by the NCC did not go far enough to find a solution. What consultations the NCC did do, were designed to bring participants on side to its predetermined option of the Daly site elevator.

[106] The Tribunal found also that the meeting of July 23, 2002 was not only infiltrated by NCC staff, but the stakeholder participants were not given enough time to consider the Consultants' Draft report and the meeting itself was rushed; scheduled to last but 2.5 hours. Finally, the Tribunal found that the option of rebuilding the stairs was not on the table and the proposal of the Daly site elevator proceeded on a false set of assumptions including the following:

- The Daly site elevator would constitute reasonable accommodation;
- The Connaught Building was out of the question;
- The parties have to choose between an elevator at the Daly site and an elevator at the Steps rather than two elevators; one at each site.

[107] As Counsel for the NCC and the AGC submit, the Tribunal erred when it stated that the Supreme Court of Canada in *Grismer,* above, established a duty to consult as a positive duty on the NCC. The Court shares this position. *Grismer,* above, involved the out right refusal of a driver's licence because of Mr. Grismer's medical condition. The Supreme Court of Canada held that the Superintendent of Motor Vehicles discriminated against the complainant because it had failed in its

duty to accommodate him by demonstrating that to provide him with an individual assessment would pose undue hardship.

[108] Thus, *Grismer,* above, does not introduce a new legal duty to consult but rather a duty to consider and reasonably assess all forms of accommodation. And herein lays the error of the Tribunal. By misapprehending the jurisprudence in *Grismer,* above, it failed to consider step by step, the new framework of analysis of the duty to accommodate under section 15 of the *Act* as instructed in both *Meiorin*, above, and *Grismer,* where Madam Justice McLachlin, as she then was, stated at paragraph 20:

> 20 Once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

[109] As counsel for the NCC underscores, the Supreme Court of Canada also held in *Grismer,* above, that there must be a precise definition of the "goal" in question:

> 24. Before we can answer these questions, we must define the Superintendent's purpose or goal with more precision. Whether a goal is "rationally connected" to a function, and whether a standard is "made in good faith" and "reasonably necessary" can only be assessed in relation to a defined goal.

[110] Applying the *Grismer* test to the present case, the goal or purpose of the NCC in constructing the Steps was to provide a safe universal point of access between upper town and lower town. In light of the topographical features, costs, as well as safety and security concerns associated with the different options, it was ill advised to provide universal access at the Steps. In the circumstances, the NCC came to the conclusion that it was not feasible to do so. That is the reality as presented.

[111] Instead, acting in good faith, the NCC imposed on the Claridge Building Corporation the immutable lease condition of the installation of a 24hr security monitored elevator at the Daly site rather than at the Steps. As the correspondence between Mr. Abel, of the NCC and Mr. Malhotra, of the developer's group reveals, the NCC would not settle for anything less, including its rejection of the LULA model elevator, which would not have provided adequate access for wheelchair users.

[112] There is evidence to indicate that the decisions not to provide universal access at the Steps and to install the Daly site elevator were rationally connected to that goal of safe universal access. There is also evidence that having regard to the initial design plans to include a ramp, then an elevator or lift at the site, all of which were ruled out as unfeasible after consultation with architects and disability groups, whether reasons of construction and maintenance costs, concerns of vandalism, or of safety and security and there is further evidence that could indicate that the NCC showed good faith in seeking out and pursuing the next best option, which was to install an elevator at the Daly site, albeit 130 meters away. Furthermore, the situation as described appears to indicate that these were rational considerations, which do not undermine the NCC's good faith.

[113] For their part, Counsel for the respondents Brown and the Commission argue that there is a duty to consult and the Tribunal's findings are supported by the evidence and are consistent with the importance of the procedures to achieve accommodation that the Supreme Court of Canada has upheld.

[114] Counsel for the intervener in both written and oral submissions argued that at the heart of the duty to accommodate lays the presumption of the duty to consult with peoples with disabilities. This presumption stems from Canada's national policies in the field and its international obligations as signatory of the *UN Convention on the Rights of Persons with Disabilities,* Adopted by UN GA 13 December 2006: UN GAOR Plen., 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), which came into force on May 3, 2008.

[115] In addition to this information, Counsel for the intervener presented a number of cases from different Canadian human rights tribunals, which have resorted to the use of consultation measures in remedial orders. These cases are of limited value to the present issue of the duty to consult. None of these cases states that there is a duty to consult. Furthermore, in *Vlug v. Canadian Broadcasting Corp.*, [2000] C.H.R.D. No. 5, the human rights case regarding the lack of captioning of certain CBC English television programs prompted Chairperson Mactavish, as she then was, to state:

> 147 [. . .] In an effort to ensure that captioning is delivered in a way that best benefits the deaf and hard of hearing community, I would strongly encourage the CBC to consult with representatives of the deaf and hard of hearing community on an ongoing basis with respect to the delivery of captioning services.
> [Emphasis by the Court]

[116] "I would strongly encourage." That is hardly compelling language anchored in the force of law. That is why the Court finds that the position of the respondents Brown and the Commission, as well as the intervener must fail on this point.

[117] The Tribunal made a legal obligation out of consultation by saying that there is a duty to consult. Such a duty can be found nowhere in the *Act.* There is a responsibility to consult with those immediately involved if the NCC is to meet its burden under section 15 of the *Act*. But it is not a legal obligation to do so. Again, by making such an error of law, the Tribunal limited its own analysis. For the above-mentioned reasons, the Court finds that the Tribunal was not correct to say that there is a legal duty to consult. Parliament did not do so and neither should the Courts.

[118] Furthermore, the Supreme Court of Canada has on more than one occasion deemed it advisable to stop short of imposing on employers (and arguably on service providers such as the NCC) a duty to consult in order to fulfil their legal obligations to accommodate. Consultations and investigations are commendable and will depend on the specific circumstances of each case. (See *Meiorin*, above, at paragraphs 66 and 73 and *Oak Bay Marina Ltd. V. British Columbia (Human Rights Commission)* (2002), 217 D.L.R. (4^{th}) 747 at paragraph 26.)

[119] While consultations and investigations may be encouraged, they are far from being mandated by law. The Tribunal has placed too heavy a burden on the NCC to consult more widely than it has. At any rate, it is not within the purview of the Tribunal or this Court to change the clear objectives of Parliament. If the legislator intended to impose such a legal duty to consult with parties in the process of accommodation to the point of undue hardship, it would certainly not have remained silent on such an important matter.

[120] Finally, the Tribunal made several findings of fact pertaining to the consultations that the NCC undertook both prior to the construction of the Steps and after the filing of Mr. Brown's human rights complaint; consultations which it found to be inadequate. Because the Tribunal committed an error in law in finding that the duty to accommodate involves a duty to consult it follows that those findings of fact are erected on a flawed legal foundation.

D. Did the Tribunal err in fact or law by limiting its analysis to the bottom of the Steps rather than approaching its analysis globally?

[121] The Tribunal limited its analysis to the bottom of the Steps rather than looking at the matter globally. Indeed, at no time does the Tribunal's decision consider the matter from the top of the Steps. Moreover, the Tribunal's limited vision of the situation with Mr. Brown sitting at the bottom of the Steps took away the perspective of the big picture; the redevelopment of a derelict general area.

[122] Having regard to all the facts, the human rights jurisprudence with respect to accommodation and the concerns of the complainant, the Court finds that had the Tribunal considered the matter globally, as the Supreme Court of Canada in *Via Rail*, above, observed, the Tribunal would have done the proper balancing and taken into consideration the goals of the NCC to provide universal access between upper town and lower town where rationally possible to do so, as part of its long-term urban redevelopment planning.

[123] Moreover, Mr. Brown indicated in his complaint form that this is a general area of which the York Street Steps are but one area of concern. In his own words, Mr. Brown states as follows:

> The area of Sussex Drive and Mackenzie Avenue is not accessible to wheelchair users. […]
> The specific area that I am concerned with is the York Street Steps.
> [. . .]

[124] While the facts are distinguishable and the decision postdates the Tribunal's decision, the Court relies on the Supreme Court of Canada's decision in *Via Rail,* above, where the majority concluded that in arriving at a determination of reasonable accommodation up to the point of undue hardship, the reviewing Court must consider the whole network and not limit itself to a specific area. Consequently, in that decision, the Supreme Court of Canada did not order Via Rail, to make every single one of its 139 Renaissance passenger rail cars accessible to wheelchair users but rather it ordered Via Rail to provide reasonable accommodation by changing 30 of the 139 cars so that one car per train would be accessible to persons with disabilities using their own wheelchairs and that all destinations were provided with such facilities.

[125] Similarly, the Daly site elevator and the York Street Steps are part of one general area, not unlike the network of Via Rail's trains. Like the 139 Renaissance passenger cars, to which persons using wheelchairs requested access, the general area in the present matter has 4 points of access between upper town and lower town, three of which are universally accessible to everyone, one of which has an elevator as part of the general area. Only one of these four access points, the Steps, is not accessible because of physical, financial and practical obstacles. Through the three avenues, all destinations are reachable whether it is Major's Hill Park, the National Gallery, the Chateau Laurier, or the Market.

[126] To reiterate, the Steps are but one of four access points between upper town and lower town of this general area, which is as Mr. Brown wrote in his complaint form, the Sussex Mackenzie Streets "Area." The York Street Steps are a specific area as is the Daly site. Both specific sites are separated by 130 metres. This is the reality. Out of four access points between Mackenzie Avenue and Sussex Drive, three are accessible by all.

[127] Someone coming from the north part of the general area (St. Patrick Street, the Basilica, the National Gallery, Murray Street and Clarence Street) can access Mackenzie Drive from Sussex Drive by going around the U.S. Embassy on the north side and vice versa. Someone coming from the south part of the general area (Rideau and Wellington Streets, the Chateau Laurier, and George Street) could access Mackenzie Street from Sussex by going around the Daly Building on Wellington Street or by using the Daly site Elevator. These access points are certainly a way to ensure, in good part the integration and participation of persons with disabilities.

[128] This of course leaves out someone like Mr. Brown who is not of pedestrian means who arrives at York Street wishing to use the steps. Mr. Brown will not have access to the Steps from York Street but he will still have access to Mackenzie Avenue from three other options in the general area, one to the North and two to the South, including the Daly site elevator.

[129] The respondent Brown argues in favour of installing a second elevator at the Steps. The Supreme Court of Canada in *Via Rail*, above, found that in the circumstances before it, it was not unreasonable to adapt 30 cars out of 139. The equation can be made in our case, where to make the area universally accessible with one elevator rather than two constitutes reasonable accommodation.

Furthermore, in our case, access between Mackenzie Avenue and Sussex Drive is achievable by the widened sidewalks from the north and south parts of the general area and also by the Daly site elevator. As Madam Justice Abella wrote for the majority in *Via Rail*, above at paragraph 224, the Tribunal is required to consider the entire context; the "environment" in which the alleged discriminatory practice arises:

> 224 It has never been the case that all forms of disability are engaged when a particular one is said to raise an issue of discrimination. While there are undoubtedly related conceptual considerations involved, they may nonetheless call for completely different remedial considerations. A reasonable accommodation "," undue hardship or "undue obstacle" analysis is, necessarily, defined by who the complainant is, what the application is, what environment is being complained about, what remedial options are required, and what remedial options are reasonably available. Given the nature of the application and the parties before it, the Agency would have acted unreasonably in seeking representations about all conceivable forms of disability. Ironically, the Court of Appeal questioned the breadth of CCD's application as it was. [Emphasis of the Court]

[130] To sum up, reviewed on the correctness standard of review, the Tribunal erred in limiting its analysis to the bottom of the Steps rather than looking at the situation globally. In light of this error in law, the Court shall intervene and substitute its view, the correct answer. Based on the law, the determination of reasonable accommodation requires a global approach and is not limited to a specific area. The analysis must take into consideration several factors, such as who the complainant is, what the application is about, and the environment; among others. In our case, all these factors have to be taken into consideration. The Tribunal erred in law when it failed to follow this global approach.

E. Did the Tribunal err in fact or law when it rejected the Daly site elevator without doing the proper balancing?

[131] The goal of human rights legislation is not perfection. Rather as the human rights jurisprudence instructs, human rights law is an evolving contextual analysis anchored in common sense and flexibility on all parties, including the decision maker, the complainant and the respondent. Paragraphs 123 and 124, of *Via Rail*, provide guidance in this regard:

> 123 What constitutes undue hardship depends on the factors relevant to the circumstances and legislation governing each case: *Chambly*, at p. 546; *Meiorin*, at para. 63. The factors informing a respondent's duty to accommodate "are not entrenched, except to the extent that they are expressly included or excluded by statute": Meiorin, at para. 63.
>
> 124 In all cases, as Cory J. noted in *Chambly*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

[132] In order to dismiss the Daly site elevator outright as the Tribunal did, it was required by law to undertake a proper balancing of the various factors, indispensable to an assessment of the elevator's suitability as an alternative, providing reasonable accommodation short of undue hardship.

[133] The Tribunal decided that the Daly site was not a reasonable accommodation. The Daly elevator was not located at or in close proximity to the Steps but rather 130 metres away, such that even half of that distance would be too much to be deemed reasonable. In the eyes of the Tribunal, this distance was not only too far but it undermined the dignity of peoples with disabilities and violated two of the principles of universal access, effort and equitable use. The only alternative

option had to be in proximity to the Steps, not the U.S. Embassy but the Connaught Building. That is why it brought Public Works into play.

[134] The Tribunal also rejected the Daly site elevator outright because it decided that the consultations of 1994 and 2002 were not adequate and were influenced by the NCC. It felt that the consultation process did not sufficiently consider all the options (for example going through the Connaught Building); having decided to assess the situation only from the bottom of the Steps. It therefore ordered that consultations would resume and the parties are to asses the alternatives in the Connaught Building and an elevator along the wall.

[135] The Court recognizes that the Daly site elevator breached two of the Principles of Universal Access. The location of the Daly elevator violates principle one, in that it is not equitable. Peoples with motor limitations are not able to climb the steps and must therefore proceed along the adapted sidewalks either North around the U.S. Embassy or South to the Daly site elevator. Able-bodied pedestrians do not have to make such detours. Also, the Steps violate principle six, in that it requires physical effort to make the detours.

[136] However, notwithstanding these two violations of the principles of universal access, the Daly elevator respects the other five principles. Five out of seven, in the Court's humble opinion, is something to be considered by any decision maker. Here too, the Court is reminded of Mr. Justice Cory's observations in *Chambly*, above. Human rights cases do not demand nor do they expect perfection. That is why common sense and flexibility should prevail at all times.

[137] Moreover, as indicated in *Via* Rail, at paragraphs 133-34, it is necessary to keep in mind that the duty to accommodate is limited by the words “reasonable” and “short of undue hardship.” The weighing of the reasonableness of a proposed accommodation varies with the context. Again, flexibility and common sense are called for. In our case, the Tribunal did not do the weighing of the reasonableness of the Daly site elevator. It excluded it automatically because of the 130-meter distance from the York Street Steps. The Tribunal closed its mind to other reasonable options unless as it favoured, such options were at or in close proximity to the steps.

[138] In *Via Rail,* above, at paragraph 225, the Supreme Court of Canada exhorts decision makers to weigh the competing interests:

> 225 The threshold of "undue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.

[139] The Tribunal therefore rejected the Daly site elevator as a reasonable form of accommodation. It did so without doing the proper balancing. As a matter of fact, because of its finding that it was to be in the proximity and that the distance of 130 metes was too far, it stopped its analysis of weighing the different factors such as security, 24 hour access, safety, costs, among others.

[140] The Court finds that based on the totality of the evidence before the Tribunal, it was not correct for the Tribunal to proceed or conclude in the manner that it did. The Court considers that had it proceeded in the correct fashion, the Tribunal would have been alive to the fact that from the

earliest planning stages of this urban redevelopment, the NCC was fully aware and anxious to fulfil its public duty to accommodate all members of the public wishing to use the Steps to move between Mackenzie Avenue and Sussex Drive at the points of access at Major Hill's Park and York Street.

[141] Had the Tribunal applied the tripartite analysis in *Grismer,* above, it would also have been moved by the evidence before it that the NCC had tried but was unable to provide accommodation to persons with disabilities at the Steps, not because of some wilful disregard for the rights of people with disabilities but because of the documented obstacles of safety, costs and security imposed by the very topography of the site. Surely nothing could be more concrete an example of a *bona fide* justification for not providing accommodation at the Steps.

[142] Having failed to follow the *Grismer* principles and apply common sense and flexibility, the Tribunal utterly dismissed the four consultation processes the NCC undertook, three times before the construction of the Steps and once, after Mr. Brown filed his human rights complaint. Had the Tribunal undertaken this analysis, it would also not have ignored the various alternatives the NCC considered as proposed by both its in-house architects and universal access experts but also by independent architectural consultants and disability groups.

[143] The Court finds that it is not enough to say the elevator down the street at the Daly site is not reasonable accommodation simply because the Respondent Brown seeks to have accommodation right at the Steps. The professional and expert reports conclude that this was not feasible. The next best thing was for the NCC to do all within its power and reasonably possible to provide alternate reasonable accommodation. The Tribunal simply states that it did not. The evidence does not support this conclusion.

[144] The Court also finds that the NCC met its duty to accommodate by fully considering all possible options first at the site and then when this was demonstrably unfeasible, it turned to the nearest option within its power and control. The next best thing was to provide accommodation not only within close proximity but also within the law, on its own premises. It would have been illegal for the NCC to encroach on the property of the U.S. Embassy, just as it would be out of its power to provide accommodation to the South inside the Connaught Building. In any event, the evidence shows that the internal use of the Connaught Building as an alternative was not feasible and doable, as Mr. Rapson acknowledged in his testimony. The Court concludes that the NCC did what was within its power to do and provided reasonable accommodation after consultation with disability representatives and after studied expert opinion.

VIII Costs

[145] Because of the legal public issues at stake and the parties involved, no costs will be awarded.

IX Conclusion

[146] After a careful review of the evidence, including the transcripts of the hearings before the Tribunal, the Court is of the opinion that based on the topographical features of the site; the NCC has discharged its obligations to provide accommodation by demonstrating that it was impossible to do so at the site. Moreover, while this is not perfect, the NCC implemented reasonable accommodation at the nearest property under its ownership and control. It is trite law that the duty to accommodate is not an absolute endeavour anchored in an ideal world of perfection. It calls, like the facts of this case compel, for reasonableness, flexibility and a healthy dose of common sense.

[147] In our case, the Tribunal changed the process to determine accommodation as provided in sections 5 and 15 of the *Act.* The Tribunal changed the *prima facie* test by shifting the onus away from the respondent. It also saw in the legislation a duty to consult which is not specifically mentioned. The Tribunal also looked at the situation with a limited point of view when it should have viewed it globally. The Tribunal also failed to do the proper balancing of the different access points. It limited its analysis to the specific area at the bottom of the Steps and simply rejected the Daly site elevator option and thereby limited the accommodation to the proximity of the York Street Steps.

[148] Consequently, the Court concludes that while the Tribunal was correct in its determination with respect to the Steps being a service or a facility, the Court does not agree with its findings of law on the four other issues in this case and therefore substitutes its views as follows:

i. The onus does shift to the respondent (the NCC) following the determination of a *prima facie* case of discrimination;

ii. The duty to accommodate does not include a legal duty to consult;

iii. The determination of reasonable accommodation requires a global approach that considers several factors including the complainant, the nature of the complaint, the environment as observed in *Via Rail*, above; and

iv. The determination of reasonable accommodation requires that the decision maker conduct a weighing of the different interests based on the circumstances of the case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THAT:

- This application for judicial review is allowed in part;

- The decision of the Canadian Human Rights Tribunal dated June 6, 2006 is quashed

and in light of the errors of law, the following is substituted as the correct decision:

1. the York Street Steps are a facility that provide a service to the general public;

2. the onus shifts to the respondent following the determination of a *prima facie* case of discrimination to establish a defence short of undue hardship;

3. the duty to accommodate does not include a duty to consult;

4. the analysis of reasonable accommodation requires looking at the situation globally; and

5. the assessment of reasonable accommodation is possible only after a proper balancing of the factors. In this case, the Court finds that based on all the circumstances, the Daly site elevator is a reasonable alternative form of accommodation to the York Street Steps.

- No costs are awarded.

"Simon Noël"

Judge

APPENDICES

1. MAP Accessibility between Upper Town and Lower Town
2. Principles of Universal Design

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1117-06
STYLE OF CAUSE:	NATIONAL CAPITAL COMMISSION Applicant and BOB BROWN and the CANADIAN HUMAN RIGHTS COMMISSION and the ATTORNEY GENERAL OF CANADA (representing the DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA Respondents and THE COUNCIL OF CANADIANS WITH DISABILITIES Intervener
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	7-8-9 April 2008
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Mr. Justice Simon Noël
DATED:	June 13, 2008

APPEARANCES:

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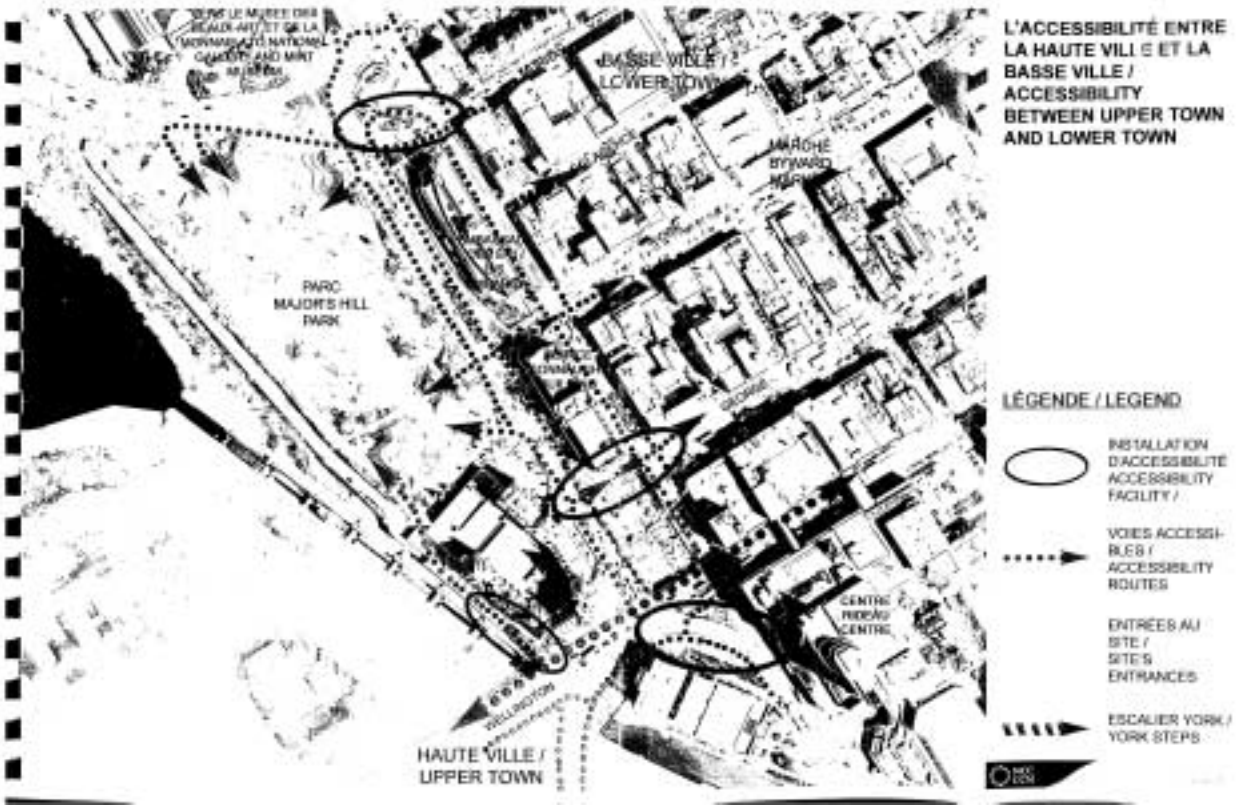
APPENDIX "1"

MAP Accessibility between Upper Town and Lower Town



APPENDIX "2"

Principles of Universal Design

Universal Design is the design of products and environments to be useable by all people, to the greatest extend possible, without the need for adaptation or specialized design.

The following seven principles and guidelines have been accepted as the rules of Universal design:

PRINCIPLE ONE: Equitable Use: The design is useful and marketable to people with diverse abilities.

PRINCIPLE TWO: Flexibility in Use: The design accommodates a wide range of individual preferences and abilities.

PRINCIPLE THREE: simple and Intuitive Use: Use of the design is easy to understand, regardless of the user's experience, knowledge, language skills, or current concentration level.

PRINCIPLE FOUR: Perceptible Information: The design communicates necessary information effectively to the user, regardless of ambient conditions or the user's sensory abilities.

PRINCIPLE FIVE: Tolerance for Error: The design minimizes hazards and the adverse consequences of accidental or unintended actions.

PRINCIPLE SIX: Low Physical Effort: The design can be used efficiently and comfortably and with a minimum of fatigue.

PRINCIPLE SEVEN: size and space of approach and Use: Appropriate size and space is provided for approach, reach, manipulation, and use regardless of user's body size, posture, or mobility.